UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

STEVEN ROBERT PRESCOTT, et al.,

Plaintiffs,

v.

RECKITT BENCKISER LLC,

Defendant.

Case No. 20-cv-02101-BLF

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

[Re: ECF 111]

Plaintiffs bring this putative class action against Defendant Reckitt Benckiser LLC ("Reckitt") on behalf of consumers who purchased Woolite laundry detergent labeled with the phrases "COLOR RENEW" and/or "revives colors" (collectively, "the color renew/revive representation"). Plaintiffs assert that the color renew/revive representation was false or misleading, because Woolite laundry detergent does not renew or revive color in clothing. They assert consumer claims on behalf of the residents of three states, California, New York, and Massachusetts.

Plaintiffs move for certification of a California class, a New York class, and a Massachusetts class of consumers. Reckitt opposes certification. The motion is GRANTED for the reasons discussed below.

I. BACKGROUND

In 2017, Reckitt launched a new marketing campaign for its Woolite brand laundry detergents. *See* Kafka Decl. ¶ 3 and Exh. 1; Exh. 7, Fuentes Dep. 33:18-24. Reckitt changed the formula of its Woolite Gentle Cycle detergent and Woolite Darks detergent, and it began

marketing those products by representing that the reformulated detergent would "renew" and "revive" color in clothing. *See* Kafka Decl. ¶ 3 and Exh. 1; Exh. 7, Fuentes Dep. 33:18-24. On 100% of those detergent bottles, the back label displayed the phrase "revives colors" as part of a prominent graphic showing that the reformulated detergent "smooths rough fibers" and "removes pilling and fuzz" with the end result that it "revives colors." *See* Henry Exh. 14, Tyrell Decl. ¶¶ 5-10. On approximately 57% of the bottles, the back label also displayed the phrase "HOW COLOR RENEW WORKS" inside a rainbow-colored hexagon. *See id.* Finally, on approximately 55% of the bottles, the front label displayed the phrase "COLOR RENEW" inside a rainbow-colored hexagon. *See id.*

In conjunction with the new marketing campaign, Reckitt implemented a [redacted]% increase in its wholesale prices for all sizes of Woolite Gentle Cycle detergent and Woolite Darks detergent, with the exception of the [redacted] *See* Kafka Decl. Exh. 3, Tedesco Dep. 90:23-91:3. Although it did not increase the wholesale price for the [redacted] Reckitt cancelled a previously-planned decrease in the wholesale price for those bottles. *See* Kafka Exh. 20, Pinsonneault Report ¶¶ 60-61.

A competitor in the detergent market, Procter & Gamble, initiated a challenge to Reckitt's advertising with the National Advertising Division ("NAD") of the Council of Better Business Bureaus.[1] *See* Kafka Exh. 37, Procter & Gamble's Challenge. Among other things, Procter & Gamble asserted that Reckitt's claim that Woolite detergent "revives color" is misleading because Woolite detergent does not add color back to fabrics. *See* Kafka Exh. 37, Procter & Gamble's Challenge at 14. In August 2019, the NAD issued a decision recommending that Reckitt discontinue its claim that Woolite detergent "revives color." *See* Kafka Exh. 41, NAD Recommendation at 16. Reckitt voluntarily agreed to discontinue the "revives color" claim. *See id.* Reckitt stopped distributing Woolite bottles with the allegedly misleading labels in April 2021. *See* Kafka Decl. Exh. 2.

[1] "The Council isn't a binding arbitral body, an administrative agency, or a judicial tribunal. Rather, it's a private organization that offers a voluntary, alternative setting for resolving 'advertising disputes between competitors.'" *NeoCell Corp. v. BioCell Tech., LLC*, No. SACV 16-02173 AG (JCGx), 2017 WL 10605266, at *1 (C.D. Cal. Aug. 21, 2017).

Plaintiff Steven Robert Prescott, a California resident, filed this putative class action in March 2020 on behalf of a California class of consumers. *See* Compl., ECF 1. He filed a first amended complaint ("FAC") in May 2020. *See* FAC, ECF 24. The Court granted in part and denied in part Reckitt's motion to dismiss the FAC, without leave to amend. *See* Order, ECF 70. The Court thereafter granted Prescott's unopposed motion for leave to file a second amended complaint ("SAC") adding additional named plaintiffs from California, New York, Massachusetts, and Washington, and additional state law claims. *See* Order, ECF 90; SAC, ECF 91. Pursuant to stipulation, the only named plaintiff from Washington and the only claim under Washington state law were voluntarily dismissed on July 19, 2021. *See* Stip., ECF 98.

The operative SAC now contains the following claims, asserted by named plaintiffs Steven Robert Prescott, Donovan Marshall, Maria Christine Anello, Darlene Kittredge, Treahanna Clemmons, and Susan Elizabeth Graciale, on behalf of the residents of California, New York, and Massachusetts: (1) violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*; (2) violation of California's Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*; (3) Quasi-Contract Claim for Restitution under California Law; (4) violation of New York General Business Law § 349 *et seq.*; (5) violation of New York General Business Law § 350 *et seq.*; (6) [dismissed]; and (7) violation of Massachusetts General Law Chapter 93A.

Plaintiffs seek certification of three classes:

> California Class: All residents of California who purchased Woolite laundry detergent with a label bearing the phrases "Color Renew" and/or "revives colors" from February 1, 2017 to the present.
>
> New York Class: All residents of New York who purchased Woolite laundry detergent with a label bearing the phrases "Color Renew" and/or "revives colors" from February 22, 2018 to the present.
>
> Massachusetts Class: All residents of Massachusetts who purchased Woolite laundry detergent with a label bearing the phrases "Color Renew" and/or "revives colors" from February 22, 2017 to the present.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 23 governs class certification. "The party seeking class certification has the burden of affirmatively demonstrating that the class meets the requirements of [Rule] 23." *Stromberg v. Qualcomm Inc.*, 14 F.4th 1059, 1066 (9th Cir. 2021) (internal quotation

marks and citation omitted). "As a threshold matter, a class must first meet the four requirements of Rule 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation." *Id*.

"In addition to Rule 23(a)'s requirements, the class must meet the requirements of at least one of the three different types of classes set forth in Rule 23(b)." *Stromberg*, 14 F.4th at 1066 (internal quotation marks and citation omitted); *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 664 (9th Cir. 2022). "To qualify for the third category, Rule 23(b)(3), the district court must find that 'the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.'" *Olean*, 31 F.4th at 664 (quoting Rule 23(b)(3)).

"Before it can certify a class, a district court must be satisfied, after a rigorous analysis, that the prerequisites of both Rule 23(a) and 23(b)(3) have been satisfied." *Olean*, 31 F.4th at 664 (internal quotation marks and citation omitted). "[P]laintiffs must prove the facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence." *Id*. at 665. "In carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), plaintiffs may use any admissible evidence." *Id*.

III. DISCUSSION

Plaintiffs assert that that all four requirements of Rule 23(a) are satisfied in this case, and that certification of a damages class is appropriate under Rule 23(b)(3). Reckitt argues that Plaintiffs have not satisfied the requirements of either Rule 23(a) or Rule 23(b)(3).

A. Rule 23(a) Requirements

1. Numerosity

Rule 23(a)(1) requires that the size of the proposed class be "so numerous that joinder of all the class members is impracticable." Fed. R. Civ. P. 23(a)(1). "No exact numerical cut-off is required; rather, the specific facts of each case must be considered." *Litty v. Merrill Lynch & Co.*, No. CV 14-0425 PA (PJWx), 2015 WL 4698475, at *3 (C.D. Cal. Apr. 27, 2015). "[N]umerosity is presumed where the plaintiff class contains forty or more members." *Id.*

Plaintiffs submit evidence that between February 1, 2017 and September 30, 2020, Reckitt sold approximately [redacted] bottles of Woolite laundry detergent labeled with the phrases "revives colors" and/or "Color Renew," and that additional bottles bearing one or both of those phrases were sold between October 1, 2020 and April 4, 2021. *See* Kafka Decl. ¶ 5 & Exh. 2. Based on the 2020 United States Census populations of California, New York, and Massachusetts, those states' proportional shares of the Woolite products at issue are approximately [redacted] bottles for California, approximately [redacted] bottles for New York, and approximately [redacted] bottles for Massachusetts. *See* Kafka Decl. ¶ 6.

While Reckitt does not dispute Plaintiffs' sales figures, Reckitt argues that Plaintiffs have not shown that all putative class members were exposed to the color renew/revive representation. Only 55% of the subject bottles displayed the phrase "COLOR RENEW" on the front label, and Reckitt asserts that Plaintiffs have not shown that purchasers of the other 45% of the bottles looked at the back label. Reckitt's argument regarding classwide exposure to the color renew/revive representation is addressed below in the context of other Rule 23 requirements. For purposes of the numerosity requirement, it is clear that each of the proposed classes would contain thousands of members, even if the classes were limited to consumers who purchased Woolite bottles bearing the phrase "COLOR RENEW" on the front label.

The Court finds that the numerosity requirement is satisfied.

2. Commonality

Rule 23(a)(2) requires the plaintiff to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The requirement cannot be satisfied by any common question, however. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). "Commonality requires the plaintiff to demonstrate that the class members have suffered the same injury." *Id.* at 349-50 (internal quotation marks and citation omitted). The claim of common injury must depend on a common contention "of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. "[C]ommonality only requires a single significant question of law or fact." *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012),

overruled on other grounds by Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC, 31 F.4th 651 (9th Cir. 2022) (en banc).[2]

Plaintiffs argue that all putative class members were injured by Reckitt's false and misleading labeling of Woolite laundry detergent. Plaintiffs assert consumer protection claims under California's UCL and CLRA, New York's General Business Law §§ 349 and 350, and Massachusetts' General Law Chapter 93A. Plaintiffs also asserts a quasi-contract claim for restitution under California state law. As a federal court sitting in diversity over Plaintiffs' state law claims, this Court applies the substantive law of the relevant state. *See Moore v. Mars Petcare US, Inc.*, 966 F.3d 1007, 1016 (9th Cir. 2020). Plaintiffs argue that their claims raise a number of common questions, including whether the color renew/revive representation on the Woolite labels is false or deceptive, and whether it is material to a reasonable consumer.

All of Plaintiffs' statutory claims are governed by the reasonable consumer test. *See Moore*, 966 F.3d at 1017 (California's UCL and CLRA); *In re Scotts EZ Seed Litig.*, 304 F.R.D. 397, 409 (S.D.N.Y. 2015) (New York's General Business Law §§ 349 and 350); *Aspinall v. Philip Morris Companies, Inc.*, 442 Mass. 381, 395-96 (2004) (Massachusetts' General Law Chapter 93A). "Numerous courts have recognized that a claim concerning alleged misrepresentations on packaging to which all consumers were exposed is sufficient to satisfy the commonality requirement because it raises the common question of whether the packaging would mislead a reasonable consumer." *Broomfield v. Craft Brew All., Inc.*, No. 17-CV-01027-BLF, 2018 WL 4952519, at *5 (N.D. Cal. Sept. 25, 2018). That commonality encompasses a quasi-contract claim for restitution under California law where such claim is based on the same representation giving rise to statutory labeling claims. *See id.* at *13. Based on these authorities, it appears that Plaintiffs have identified at least two common questions – whether the color renew/revive representation on Woolite detergent labels is false or deceptive, and whether it is material to a reasonable consumer.

[2] In *Olean*, the Ninth Circuit *en banc* "overrule[d] the statement in *Mazza* that 'no class may be certified that contains members lacking Article III standing.'" *Olean*, 31 F.4th at 682 n.32. The *Olean* court held that statement to be inapplicable "when a court is certifying a class seeking injunctive or other equitable relief." *Id.* Other aspects of *Mazza* "remain good law." *Id.*

Reckitt argues that Plaintiffs have not satisfied the common question requirement because they have neither demonstrated classwide exposure to the color renew/revive representation, nor shown the existence of common evidence that may be used on a classwide basis to prove that the representation is false or misleading. In their reply, Plaintiffs contend that they have demonstrated classwide exposure to the color renew/revive representation and have presented common evidence that the representation is false or misleading.

a. Classwide Exposure

Reckitt points out that only 55% of the Woolite bottles at issue displayed the "COLOR RENEW" language on the front label, and that 45% of the bottles displayed the "COLOR RENEW" and/or "revives color" language only on the back label. Reckitt argues that "Plaintiffs submitted no evidence showing that proposed class members or the reasonable consumer reviews the back label before purchase, let alone paid attention to the 'revives color' language." Opp. at 8. Reckitt submits evidence that two of the named plaintiffs did not rely on the back label when purchasing Woolite detergent. *See* Henry Decl. Exh. 8, Clemmons Dep. 143:19-144:11; Exh. 10, Kittredge Dep. 83:2-9. One of the named plaintiffs could not remember whether he saw the back label before purchasing the detergent. *See* Henry Decl. Exh. 11, Marshall Dep. 138:19-140:14. Based on this record, Reckitt contends that exposure to the color renew/revive representation is not established for purchasers of 45% of the Woolite bottles at issue.

"Under California law, class members in CLRA and UCL actions are not required to prove their individual reliance on the allegedly misleading statements." *Bradach v. Pharmavite, LLC*, 735 F. App'x 251, 254 (9th Cir. 2018). "Instead, the standard in actions under both the CLRA and UCL is whether members of the public are likely to be deceived." *Id*. (internal quotation marks and citation omitted). "For this reason, courts have explained that CLRA and UCL claims are ideal for class certification because they will not require the court to investigate class members' individual interaction with the product." *Id*. at 254-55. Claims under New York's General Business Law §§ 349 and 350 likewise do not require proof of reliance; labeling claims under those statues turn on whether the label "was false, and if so, whether it was likely to mislead a reasonable consumer acting reasonably under the circumstances." *In re Scotts EZ Seed Litig.*, 304

F.R.D. at 409. The same holds true for claims under Massachusetts' General Law Chapter 93A. *See Aspinall*, 442 Mass. at 397 ("Neither an individual's smoking habits nor his or her subjective motivation in purchasing Marlboro Lights bears on the issue whether the advertising was deceptive."). Consequently, Reckitt's argument premised on Plaintiffs' failure to show actual reliance on the back label is misplaced.

It is undisputed that every putative class member purchased Woolite bottles displaying the phrases "COLOR RENEW" and/or "revives color." Plaintiffs argue, and the Court agrees, that these phrases are so similar that they may be viewed collectively as a single representation regarding the effect of Woolite detergent on clothing. *See In re First All. Mortg. Co.*, 471 F.3d 977, 992 (9th Cir. 2006) ("The class action mechanism would be impotent if a defendant could escape much of his potential liability for fraud by simply altering the wording or format of his misrepresentations across the class of victims."). Reckitt does not argue to the contrary. Plaintiffs have established that the color renew/revive representation appeared in one or more forms on each and every bottle of Woolite detergent sold to putative class members. In general, "[w]here the alleged misrepresentation appears on the label or packaging of each item being sold, class-wide exposure to it may be inferred." *Zakaria v. Gerber Prod. Co.*, No. LA CV15–00200 JAK (Ex), 2016 WL 6662723, at *8 (C.D. Cal. Mar. 23, 2016); *see also McCrary v. Elations Co., LLC*, No. EDCV 13-00242 JGB OP, 2014 WL 1779243, at *10 (C.D. Cal. Jan. 13, 2014) ("By definition, class members were exposed to these labeling claims, creating a common core of salient facts.").

Reckitt correctly notes that some district courts have declined to infer classwide exposure where the alleged misrepresentation is not "prominently displayed on the packaging." *Hadley v. Kellogg Sales Co.*, 324 F. Supp. 3d 1084, 1099 (N.D. Cal. 2018); *see also Zakaria*, 2016 WL 6662723, at *8. In *Hadley*, the district court concluded that "the 'wholesome goodness' phrase on Nutri-Grain packaging was not sufficiently 'prominently displayed' to warrant an inference of class-wide exposure." *Hadley*, 324 F. Supp. 3d at 1099-1100. The phrase in question appeared on the back panel of the Nutri-Grain packaging, in small font, and in the middle of a block of text. *See id.* In *Zakaria*, the district court likewise declined to infer classwide exposure with respect to language that was not "prominently displayed" on the packaging. *Zakaria*, 2016 WL 6662723, at

*8. The language at issue was in small font, in a block of text, and located on the back or inside cover of the product package. *See id*. Reckitt urges this Court to follow *Hadley* and *Zakaria* in adding a prominence requirement to the general rule that classwide exposure may be inferred where the alleged misrepresentation appears on the label of each product sold. Reckitt argues that "for about 43 percent of the [redacted] units referred to in the Motion, the only reference to the renews/revives color claim is 'revives color' in small font size on the back – by no means 'prominently displayed' – within the graphic." Opp. at 20.

In their reply, Plaintiffs cite *Krommenhock*, in which the district court rejected the prominence requirement articulated in *Hadley* and *Zakaria*. *See Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 565 (N.D. Cal. 2020). The *Krommenhock* court carefully reviewed the reasoning of *Hadley* and *Zakaria*, the cases cited by those decisions, and other relevant authorities. *See id.* Ultimately, the *Krommenhock* court concluded that California law does not support a requirement that an alleged misrepresentation must be prominently displayed on the label or packaging before classwide exposure may be inferred. *See id.* This Court agrees with *Krommenhock* that a prominence requirement is not supported by California law. Reckitt has not cited, nor has the Court discovered, any New York or Massachusetts cases imposing a prominence requirement. Accordingly, the Court finds that all putative class members were exposed to the color renew/revive representation, including those who purchased Woolite bottles displaying only the phrase "revives color" on the back label.

Even if prominence were required, the Court would find that requirement met in this case. The back label of all Woolite bottles at issue displayed the phrase "revives colors" as part of a prominent graphic that takes up the entire upper portion of the back label. *See* Henry Exh. 14, Tyrell Decl. ¶¶ 5-10. The present case therefore is distinguishable from *Hadley* and *Zakaria*, which involved language displayed in small font and buried in a block of text.

In conclusion, the Court finds that Plaintiffs have established classwide exposure to the color renew/revive representation, meaning that all putative class members "have suffered the same injury" as required by *Dukes*. *See Dukes*, 564 U.S. at 349-50.

b. Common Evidence

Reckitt contends that the commonality requirement is not satisfied because Plaintiffs have not shown the existence of common evidence that may be used on a classwide basis to prove that the color renew/revive representation was false or misleading. "In determining whether the 'common question' prerequisite is met, a district court is limited to resolving whether the evidence establishes that a common question is *capable* of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial." *Olean*, 31 F.4th at 666-67. "While such an analysis may entail some overlap with the merits of the plaintiff's underlying claim, the merits questions may be considered only to the extent that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id*. at 667 (internal quotation marks, citations, and brackets removed). "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." *Id*. (internal quotation marks and citation omitted).

Plaintiffs submit the opinion of their chemistry expert, Dr. Randy Meirowitz, who tested the Woolite products at issue and concluded that they do not renew or revive color in clothing. Reckitt challenges the admissibility of Dr. Meirowitz's opinion under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). For the reasons discussed below, the Court determines that Dr. Meirowitz's opinion is admissible and capable of establishing on a classwide basis that the color renew/revive representation was false or misleading.

Rule 702 provides that a qualified expert may testify if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702. The Supreme Court's trilogy of cases addressing the admissibility of expert testimony – *Daubert*, 509 U.S. 579, *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) – require the district court to play a "gatekeeping" role, ensuring that any expert opinion admitted is both relevant and reliable. So long as an expert's methodology is sound and his opinions satisfy

the requirements of Rule 702, underlying factual disputes and how much weight to accord the expert's opinion are questions for the jury. *See Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010).

Dr. Meirowitz has a Ph.D. in chemistry and more than 30 years of experience in surface science, including the testing of textiles. *See* Kafka Decl. Exh. 27, Meirowitz Report ¶¶ 12-14. He designed and oversaw testing to determine whether Woolite laundry detergent renews or revives color in clothing. *See id.* ¶¶ 38-47. The testing was based on American Association Textile Chemists and Colorists ("AATCC") protocols, the industry standard for the testing of textiles in the United States. *See id.* ¶¶ 31-34. Dr. Meirowitz states that in his experience, the standardized tests from the AATCC are widely accepted for use in testing clothing. *See id.* ¶ 34.

The testing was conducted at an accredited laboratory, TexTest Laboratories in Columbus, Georgia. *See* Kafka Decl. Exh. 27, Meirowitz Report ¶ 40. Dr. Meirowitz elected to use eight samples of cotton clothing for the test, four navy blue t-shirts and four red t-shirts. *See id.* ¶ 35. The t-shirts were washed with detergent from a 150-ounce bottle of Woolite Darks laundry detergent purchased in 2019. *See id.* ¶ 36. The front label of the Woolite bottle displayed the phrase "COLOR RENEW," and the back label displayed the phrases "COLOR RENEW" and "revives colors." *See id.* Pursuant to the instructions on the detergent bottle, the t-shirts were machine washed in cold water twenty-five times. *See id.* ¶ 41. A Datacolor spectrophotometer was used to measure the color of the unwashed t-shirts and then the color of the t-shirts at 1, 2, 10, 15, and 25 washes. *See id.* ¶ 42. All eight t-shirts lost a substantial amount of color after 10 washes. *See id.* ¶ 44. The t-shirts continued to lose a substantial amount of color between 10 and 25 washes. *See id.* Based on this testing, Dr. Meirowitz concluded that Woolite laundry detergent does not renew or revive color in clothing. *See id.* ¶ 45.

Reckitt contends that Dr. Meirowitz's test is inadmissible under Rule 702 and the *Daubert* line of cases because it did not analyze the relevant question of whether Woolite laundry detergent renews or revives color in clothing. Plaintiffs allege that they understood the color renew/revive representation to mean that Woolite detergent would bring color *back* to their clothing. Reckitt argues that Dr. Meirowitz did not test whether that was true, because he started with new t-shirts,

and color cannot be brought back to new clothing. In their reply, Plaintiffs point out that Dr. Meirowitz's testing showed loss of color between 0 and 10 washes, and additional loss of color between 10 and 25 washes. *See* Kafka Decl. Exh. 27, Meirowitz Report ¶ 44. Thus, even if the first wash did not provide an opportunity for the Woolite detergent to bring color back to the t-shirts, that opportunity was provided at all subsequent washes. By wash 10, the t-shirts no longer qualified as new. However, color continued to be lost between wash 10 and wash 25. The Court finds Reckitt's challenge to Dr. Meirowitz's methodology to be without merit.

Reckitt asserts that Dr. Meirowitz's testing was not reliable because he did not control for all potential causes of color change, citing to his deposition testimony. *See* Henry Exh. 3, Meirowitz Dep. 21:20-22. Prior to the cited portion of his deposition transcript, Dr. Meirowitz had been asked whether he understood that Reckitt's color renew/revive representation was based on removal of pilling and fuzz from fabric. *See id.* 20:22-21:9. Dr. Meirowitz stated that he had reviewed documents on Reckitt's new chemical formulation and its effect on cotton fabric, but that during testing "[t]he probe was into color renewal, not quantifying a method and excluding any other possibilities for color change." *Id*. 21:20-22. That testimony does not undermine Dr. Meirowitz's testing results; rather it confirms that Dr. Meirowitz tested for color renewal and not anything else.

Finally, Reckitt argues that Dr. Meirowitz's opinion is inadmissible because he did not personally wash the t-shirts but instead relied on the report created by TexTest, the accredited laboratory that performed the test Dr. Meirowitz designed. According to Reckitt, the TexTest report is inadmissible hearsay, and any opinion based on that hearsay is inadmissible. Under Federal Rule of Evidence 703, "An expert may base an opinion on facts or data in the case that the expert *has been made aware of* or personally observed." Fed. R. Evid. 703 (emphasis added). "If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." *Id*. In this manner, "Rule 703 relaxes, for experts, the requirement that witnesses have personal knowledge of the matter to which they testify." *Claar v. Burlington N. R. Co.*, 29 F.3d 499, 501 (9th Cir. 1994). "Experts may offer opinions based on otherwise inadmissible testimonial hearsay if experts in the

particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, and if they are applying their training and experience to the sources before them and reaching an independent judgment, as opposed to merely acting as a transmitter for testimonial hearsay." *Erhart v. BofI Holding, Inc.*, 445 F. Supp. 3d 831, 839 (S.D. Cal. 2020) (internal quotation marks, citations, and brackets omitted). Based on these authorities, the Court finds that Dr. Meirowitz's reliance on testing performed by TexTest does not render his opinion inadmissible.

Caldwell and *Mejia*, cited by Reckitt, stand for the proposition that "expert witnesses may not simply repeat hearsay without bringing their expertise to bear" on it. *Caldwell v. City of San Francisco*, No. 12-CV-01892-DMR, 2021 WL 1391464, at *5 (N.D. Cal. Apr. 13, 2021) (internal quotation marks, citation, and brackets omitted); *see also United States v. Mejia*, 545 F.3d 179, 197 (2d Cir. 2008) ("The expert may not, however, simply transmit that hearsay to the jury. . . . Instead, the expert must form his own opinions by 'applying his extensive experience and a reliable methodology' to the inadmissible materials."). *Caldwell* and *Mejia* are inapplicable here, because Dr. Meirowitz brought his own expertise to bear in designing and analyzing the testing performed by TexTest.

Having determined that Dr. Meirowitz's opinion is admissible and capable of establishing that the color renew/revive representation was false or misleading, the Court need not address Plaintiffs' additional proffered evidence of falsity.

c. Conclusion Re Commonality

The Court finds that Plaintiffs have identified common questions that are central to the validity of all claims remaining in the SAC. The Court finds Reckitt's arguments that Plaintiffs have not established classwide exposure, or the existence of common evidence, to be without merit.

The Court finds that the commonality requirement is satisfied.

3. Typicality

Rule 23(a)(3) requires that "the [legal] claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Typicality is satisfied "when each class member's

claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendants' liability." *Rodriguez v. Hayes*, 591 F.3d 1105, 1124 (9th Cir. 2010) (internal quotation marks and citation omitted). "The requirement is permissive, such that representative claims are typical if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1116 (9th Cir. 2017) (internal quotation marks and citation omitted). However, "[a] court should not certify a class if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it." *Id.* (internal quotation marks and citation omitted).

Plaintiffs assert that the typicality requirement is satisfied because all claims, including their own and those of putative class members, arise from exposure to the same color renew/revive representation on Woolite labels. Reckitt suggests that three of the six named plaintiffs – Clemmons, Kittredge, and Marshall – are not typical because they did not review the back label before purchase. The cited evidence establishes that Clemmons and Kittredge did not rely on the back label, and that Marshall could not remember whether he saw the back label before purchasing the Woolite detergent. *See* Henry Decl. Exh. 8, Clemmons Dep. 143:19-144:11; Exh. 10, Kittredge Dep. 83:2-9; Exh. 11, Marshall Dep. 138:19-140:14. This evidence does not render those plaintiffs atypical, however. As discussed above, Plaintiffs' claims do not require proof of actual reliance on the color renew/revive representation. Plaintiffs need show only that they were exposed to that representation. Plaintiffs have established classwide exposure to the color renew/revive representation, because every bottle of Woolite detergent at issue displayed the phrase "COLOR RENEW" and/or the phrase "revives colors."

The Court finds that the typicality requirement is satisfied.

4. Adequacy

To determine Plaintiffs' adequacy as class representatives, the Court "must resolve two questions: (1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 985 (9th Cir. 2011) (internal quotation marks and citation omitted). The record does not reflect any conflicts of

interest. Plaintiffs and their counsel have demonstrated their ability and intention to prosecute this action vigorously on behalf of the class. Reckitt does not challenge Plaintiffs' adequacy as class representatives.

The Court finds that the adequacy requirement is satisfied.

B. Rule 23(b)(3)

"In addition to satisfying Rule 23(a)'s prerequisites, parties seeking class certification must show that the action is maintainable under Rule 23(b)(1), (2), or (3)." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). Plaintiffs seek certification under Rule 23(b)(3). A class may be certified under Rule 23(b)(3) only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). "Further, parties seeking to certify a Rule 23(b)(3) class must also demonstrate that the class is sufficiently ascertainable." *Datta v. Asset Recovery Sols., LLC*, No. 15-CV-00188-LHK, 2016 WL 1070666, at *2 (N.D. Cal. Mar. 18, 2016).

1. Ascertainability

"[A] class is ascertainable if the class is defined with objective criteria and if it is administratively feasible to determine whether a particular individual is a member of the class." *Huynh v. Harasz*, No. 14-CV-02367-LHK, 2015 WL 7015567, at *13 (N.D. Cal. Nov. 12, 2015) (internal quotation marks and citation omitted). Plaintiffs do not expressly address the issue of ascertainability. However, the class definitions in this case rely on objective criteria – purchase of Woolite laundry detergent with a label bearing the phrases "Color Renew" and/or "revives colors" during the relevant class period. Reckitt does not dispute the ascertainability of the putative classes.

The Court finds that the putative classes are ascertainable.

2. Predominance of Common Questions

"When one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses

peculiar to some individual class members." *Olean*, 31 F.4th at 668 (internal quotation marks and citation omitted). The plaintiffs need not show that they are likely to succeed on the common issues in the case. *See id.* at 667. "[A] district court cannot decline certification merely because it considers plaintiffs' evidence relating to the common question to be unpersuasive and unlikely to succeed in carrying the plaintiffs' burden of proof on that issue." *Id.* If the plaintiffs present evidence that could sustain a reasonable jury verdict on the merits of a common question as to all class members, a district court may conclude that the plaintiffs have carried their burden under Rule 23(b)(3). *See id.*

Plaintiffs assert that common questions of law and fact predominate over individual questions in this case. As discussed above in the context of the Rule 23(a)(2) commonality inquiry, Plaintiffs have demonstrated the existence of substantial common questions relating to liability. Plaintiffs have shown that all putative class members were exposed to the color renew/revive representation, and have presented common evidence (Dr. Meirowitz's opinion) that the representation was false. In addition, Plaintiffs have shown that their statutory claims are governed by an objective reasonable consumer test, and that none of their claims require proof of individual reliance.

Reckitt suggests that the graphic on the back label impacts the predominance inquiry, asserting that "[a]ny consumer reviewing the back label would understand that the Woolite Laundry Detergent revives colors by smoothing rough fibers and removing pilling and fuzz." Opp. at 22. Reckitt argues that "[a]t a minimum, individual issues predominate as to whether a class member viewed the back label, and, if so, whether he or she understood how the product would work and on which types of fabric." *Id.* This argument is misplaced, because Plaintiffs need not show that any putative class member actually reviewed and relied on the back label to prevail on their claims.

Based on the foregoing, the Court has no difficulty concluding that Plaintiffs have met their burden to show that common questions of law and fact predominate over individual questions relating to liability. That is not the end of the predominance inquiry, however. "Rule 23(b)(3)'s predominance requirement takes into account questions of damages." *Just Film*, 847

F.3d at 1120. Plaintiffs must propose a damages model that is consistent with its theory of liability and capable of measuring damages on a classwide basis. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 34-35 (2013).

Plaintiffs' theory of liability is that the color renew/revive misrepresentation on the Woolite labels caused putative class members to overpay for the detergent. Plaintiffs seek to recover, as restitution or damages, the "price premium" attributable to the color renew/revive feature they thought they were getting but did not receive. "The difference between what the plaintiff paid and the value of what the plaintiff received is a proper measure of restitution in UCL cases." *In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 131 (2009). Plaintiff also seeks this measure of restitution under their quasi-contract theory, which is based on the same facts as their UCL and CLRA claims. With respect to the CLRA claim, the price premium is an appropriate measure of recovery for product mislabeling. *See Brazil v. Dole Packaged Foods*, LLC, No. 12-CV-01831-LHK, 2014 WL 5794873, at *5 (N.D. Cal. Nov. 6, 2014). The price premium also is an appropriate measure of damages under New York's General Business Law §§ 349 and 350. *See Hasemann v. Gerber Prod. Co.*, 331 F.R.D. 239, 275 (E.D.N.Y. 2019). Finally, the price premium is an appropriate measure of damages under Massachusetts' General Law Chapter 93A. *See Aspinall*, 442 Mass. at 399 (approving damages measured by "the difference between the price paid by the consumers and the true market value of the 'misrepresent[ed]' cigarettes they actually received").[3]

Plaintiffs offer the opinion of their damages expert, Gregory Pinsonneault, to quantify the price premium paid by the putative class and attributable to the color renew/revive representation on the Woolite labels. *See* Kafka Decl. Exh. 20, Pinsonneault Report; Exh. 17, Pinsonneault Reply Report. Mr. Pinsonneault has a Bachelor of Science in computer science, a Bachelor of Arts in economics and mathematics, and a Master of Arts degree in economics. *See* Kafka Decl. Exh. 20, Pinsonneault Report ¶ 6. He has worked as a consultant for nineteen years and currently

[3] As an alternative to the price premium, statutory damages are available under New York's General Business Law §§ 349 and 350 and Massachusetts' General Law Chapter 93A. Plaintiffs do not seek statutory damages in this case, however – they seek the price premium as the measure of classwide restitution and damages.

is the managing director and chief executive officer of a financial and economic consulting firm. *See id.* ¶¶ 4, 7.

Mr. Pinsonneault opines that the price premium each class member paid as a result of the color renew/revive representation may be calculated as [redacted]% of the purchase price. *See* Kafka Decl. Exh. 20, Pinsonneault Report ¶ 64. Mr. Pinsonneault selected the [redacted]% figure based on Reckitt's implementation of a [redacted]% increase in its wholesale prices in conjunction with its new Woolite marketing campaign. *Id.* ¶ 35. In Mr. Pinsonneault's view, Reckitt's internal materials clearly tie the [redacted]% price increase to the color renew/revive representation. *See id.* ¶¶ 36-43. Mr. Pinsonneault concludes that "the Color Renew/Revive misrepresentations were the driver of the [redacted]% price increase." *Id.* ¶ 43.

In reaching that conclusion, Mr. Pinsonneault considered and rejected alternative explanations for the price increase offered by Christopher Tedesco, Reckitt's General Manager of United States Marketing for Hygiene. *See* Kafka Decl. Exh. 20, Pinsonneault Report ¶¶ 44-53. Mr. Tedesco testified at his deposition that the color renew/revive marketing campaign was a factor in the decision to implement the [redacted]% price increase, but that other factors played into that decision as well, including: [redacted] *See id.* Mr. Pinsonneault asserts Mr. Tedesco's explanation that Reckitt raised the price of Woolite [redacted]% due to [redacted] is not economically rational. *See id.* ¶ 46. According to Mr. Pinsonneault, [redacted] generally will decrease demand for the product, which in turn will lead to a decrease in prices. *See id.* Mr. Pinsonneault also opines that none of the factors identified by Mr. Tedesco, other than the color renew/revive campaign, would increase demand for Woolite detergent, and therefore none of those factors provide an economic justification for the [redacted]% price increase. *See id.* ¶¶ 52-53.

Mr. Pinsonneault notes that the new Woolite detergent formula appears to be less expensive than the prior formula. *See* Kafka Decl. Exh. 20, Pinsonneault Report ¶¶ 54. He explains that usually a reduction in production costs would be expected to result in lower prices.

See id. However, Reckitt raised prices. Mr. Pinsonneault opines that the only change that occurred around the time of the [redacted]% price increase was the color renew/revive marketing. *See id.* ¶ 55. He concludes that the [redacted]% increase is a reasonable measure of the impact that the color renew/revive representation had on the price. *See id.* ¶ 56. Mr. Pinsonneault acknowledges that there was no price increase on the [redacted] size of Woolite Gentle Cycle detergent and Woolite Darks detergent. *See id.* ¶¶ 60-61. However, he concludes that Reckitt's decision not to implement a previously planned price decrease as to those products is attributable to the color renew/revive campaign. *See id.*

Recognizing that the [redacted]% increase was with respect to wholesale prices, Mr. Pinsonneault explains that the general economic rule is that price increases flow through to retail prices. *See* Kafka Decl. Exh. 20, Pinsonneault Report ¶ 62. He opines that Woolite products do not have the characteristics of the types of products for which a wholesale price increase is not passed through to the consumer. *See id.* Mr. Pinsonneault therefore concludes that it is reasonable to use the [redacted]% figure to approximate the price premium paid by each class member and attributable to the color renew/revive representation on the label. *See id.* ¶ 72. He lays out the mechanics of that calculation and states that it may performed on a classwide basis regardless of variations in the actual prices paid by individual class members. *See id.* ¶ 73.

Reckitt contends that Plaintiffs' "damages model is not tethered to their theory of liability" as required under *Comcast* in order to satisfy Rule 23(b)(3). Opp. at 23. In *Comcast*, the plaintiffs initially relied on four theories of antitrust liability and calculated aggregate damages based on those four theories. *See Comcast*, 569 U.S. at 36-37. However, the district court certified the class based on only one of the four theories. *See id*. at 35. The plaintiffs did not offer a method of calculating damages for liability stemming from that theory alone. *See id*. Pointing out that "a model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that [surviving] theory," the Supreme Court determined that "[i]f the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3)." *Id.* The Ninth Circuit has "interpreted *Comcast* to mean that plaintiffs must be able to show that their damages stemmed

from the defendant's actions that created the legal liability." *Vaquero v. Ashley Furniture Indus., Inc.*, 824 F.3d 1150, 1154 (9th Cir. 2016) (internal quotation marks and citation omitted). In the present case, the damages model articulated by Mr. Pinsonneault is firmly tethered to Plaintiffs' theory of liability. Plaintiffs seek to recover the price premium they paid for the color renew/revive feature promised on the Woolite labels. The price premium is an appropriate measure of recovery for all of their claims. Mr. Pinsonneault's damages model is designed to calculate that price premium for each class member. "Therefore, even if the measure of damages proposed here is imperfect, it cannot be disputed that the damages (if any are proved) stemmed from *Defendant['s]* actions." *Vaquero*, 824 F.3d at 1155.

Reckitt's real quibble with Plaintiffs' damages model is the method by which Mr. Pinsonneault proposes to calculate the price premium. Reckitt does not assert a *Daubert* challenge to Mr. Pinsonneault's opinion. However, Reckitt cites numerous cases in which damages models were rejected, and it argues that Plaintiffs' damages model suffers from similar defects. In *Brazil*, a consumer class action based on alleged misrepresentations in product labeling, the district court initially approved the plaintiffs' use of a regression model to calculate the price premium attributable to the allegedly misleading label statements. *See Brazil*, 2014 WL 5794873, at *5. The district court subsequently decertified the class in part, finding that the plaintiffs' regression model failed to isolate a price premium attributable to the labeling claim. *See id*. In *Zakaria*, the Ninth Circuit affirmed the district court's decertification of a product labeling class that initially had been certified based on a damages model using conjoint analysis. *Zakaria v. Gerber Prod. Co.*, 755 F. App'x 623, 624 (9th Cir. 2018). The Ninth Circuit determined that the conjoint analysis showed only how much consumers subjectively valued the labeling at issue, but did not contain any evidence that consumers had paid higher prices based on that labeling. *See id*. at 624-25. In *In re Graphics Processing Units*, the district court found that the plaintiffs' damages model did not support class certification, because it did not demonstrate how pass-through of wholesale pricing to retailers could be established absent a wholesaler-by-wholesaler and re-seller-by-re-seller investigation. *See In re Graphics Processing Units*, 253 F.R.D. 478, 505 (N.D. Cal 2008).

These cases are factually distinguishable from the present case, in which Mr. Pinsonneault

uses Reckitt's documented [redacted]% price increase as an approximation for the price premium. Mr. Pinsonneault explains how he isolated the price premium paid for the color renew/revive representation by discounting other explanations for the [redacted]% price, addressing the problem raised in *Brazil*. Unlike the model in *Zakaria*, Mr. Pinsonneault's model is based on an actual [redacted]% priced increase implemented by Reckitt, not on a mere hypothetical. *In re Graphics Processing Units* was an antitrust case in which calculation of damages was complicated by an intricate distribution chain involving multiple distribution channels. That court's discussion of pass-through in circumstances very different from those in this case is not particularly helpful.

"In calculating damages, here restitution, California law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." *Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 989 (9th Cir. 2015) (internal quotation marks and citation omitted). In *Nguyen*, the Ninth Circuit reversed the district court's denial of class certification in a consumer class action alleging that the defendants sold vehicles with a faulty clutch system. *Nguyen v. Nissan N. Am., Inc.*, 932 F.3d 811 (9th Cir. 2019). The plaintiff sought to recover damages equaling the amount he purportedly overpaid in purchasing a vehicle with a defective clutch, and his damages model used the cost of replacing the defective clutch as a proxy for the amount of his overpayment. *See id*. at 821. The Ninth Circuit found that the plaintiff's damages model satisfied *Comcast*, stating that "[w]hether his proposed calculation of the replacement cost is accurate, whether the clutch was actually defective, and whether Nissan knew of the alleged defect are merits inquiries unrelated to class certification." *Id*. The Ninth Circuit concluded that, "For now, it is sufficient that Plaintiff has demonstrated the nexus between his legal theory – that Nissan violated California law by selling vehicles with a defective clutch system that was not reflected in the sale price – and his damages model – the average cost of repair." *Id*.

In the present case, this Court likewise finds that, at the class certification stage, it is sufficient that Plaintiffs have demonstrated a nexus between their legal theory and their damages model. Whether Mr. Pinsonneault's proposed calculation for the price premium is accurate is a question to be decided at a later date.

The Court finds that the predominance requirement of Rule 23(b)(3) is satisfied.

3. Superiority of Class Action

To satisfy Rule 23(b)(3), Plaintiffs must demonstrate that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Rule 23 lists the following factors that Courts should consider in making this determination: "(A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action." Fed. R. Civ. P. 23(b)(3).

Plaintiffs assert that class members' interests in bringing separate actions is minimal, as any recovery under such an action would be dwarfed by the cost of litigation. Plaintiffs state that there are no other relevant cases pending. Defendant consented to Plaintiffs' addition of state law claims from other jurisdiction – New York and Massachusetts – to this suit. Finally, the issues presented by this action are manageable given the defined class and the existence of common proof regarding central issues. Reckitt does not offer any argument regarding these factors and the Court finds Plaintiffs' arguments to be persuasive.

The Court finds that the superiority requirement of Rule 23(b)(3) is satisfied.

IV. ORDER

(1) Plaintiffs' motion for class certification is GRANTED.

(2) Pursuant to Federal Rule of Civil Procedure 23, the Court hereby certifies the following Classes:

(a) California Class: All residents of California who purchased Woolite laundry detergent with a label bearing the phrases "Color Renew" and/or "revives colors" from February 1, 2017 to the present.

(b) New York Class: All residents of New York who purchased Woolite laundry detergent with a label bearing the phrases "Color Renew" and/or "revives colors" from February 22, 2018 to the present.

(c) Massachusetts Class: All residents of Massachusetts who purchased Woolite laundry detergent with a label bearing the phrases "Color Renew" and/or "revives colors" from February 22, 2017 to the present.

(3) Excluded from the Classes are the Defendant, any entity in which Defendant has a controlling interest, and Defendant's officers, directors, legal representatives, successors, subsidiaries, and assigns. Also excluded are any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

(4) The Court appoints Steven Prescott, Donovan Marshall, and Treahanna Clemmons as class representatives for the California Class; Maria Christine Anello as class representative for the New York Class; Darlene Kittredge and Susan Graciale as class representatives for the Massachusetts Class; and Eric Kafka of Cohen Milstein Sellers & Toll as class counsel for the Classes.

(5) Notice shall be provided to the Classes as required under Rule 23.

(6) This order terminates ECF 111.

Dated: July 14, 2022

BETH LABSON FREEMAN
United States District Judge

United States District Court
Northern District of California